PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
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In The
Supreme Court of the United States

BERNARD F. SCHULTZ;
ELIZABETH M. SABATINE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI
with Appendix

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October, 2008

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QUESTIONS PRESENTED

1. When a bankruptcy law is challenged as being geographically non-uniform is the standard of scrutiny "rational basis" as applied by the lower courts, or is it "close" or heightened scrutiny as this Court has previously held for similar challenges to geographically defined taxation classifications?

2. Does a classification scheme for determining the scope and availability of bankruptcy relief which incorporates into bankruptcy law a different income threshold for each State based upon federal median income statistics violate the requirement of geographic uniformity under Art. I § 8, cl. 4 of the U.S. Constitution?

3. Do Congressionally mandated expense deductions for determining the scope and availability of bankruptcy relief which vary by county throughout the country based on Internal Revenue Service national and local standards under Title 26 violate the requirement of geographic uniformity for bankruptcy laws under Art. I § 8, cl.4 of the U.S. Constitution?

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The Petitioners are Bernard Francis Schultz and Elizabeth Mary Sabatine, husband and wife and debtors in a chapter 13 proceeding pending in the United States Bankruptcy Court for the Eastern District of Tennessee.

The Respondent is the United States of America.

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The opinion of the court of appeals is reported at 529 F. 3d 343 (6th Cir. 2008) and the opinion of the district court is reported at 369 B.R. 349 (ED Tn 2007).

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on June 2, 2008, with the Petition For Rehearing *En Banc* denied on September 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. The Bankruptcy Clause of the Constitution grants Congress the power:

> To establish... uniform Laws on the subject of bankruptcies throughout the United States. U.S. Const., Art. I, § 8, cl. 4 ("Bankruptcy Clause").

II. The following Bankruptcy Code (Title 11 U.S. Code) provisions are at issue in this proceeding and are set forth in the Appendix:

a. 11 U.S.C. § 707(b)(2)

b. 11 U.S.C. § 707(b)(7)

c. 11 U.S.C. § 1325(b)(2) – (4)

STATEMENT OF THE CASE

In devising "needs-based bankruptcy relief"[1] under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Congress established a bankruptcy law with significant and myriad geographical differences. The scope and extent of bankruptcy relief under the "means test" contained in BAPCPA is determined by whether the debtor's income is above or below the applicable federally calculated median income for the State in which the debtor lives.[2] The applicable income threshold in this case varies from a low of $54,026 in Mississippi[3] to $98,505 in Connecticut and is different for each State. If the debtor is classified as "above median income" then the allowable expense deductions are substantially determined by reference to national and local standards contained in the Internal Revenue Service ("IRS") Financial Analysis Handbook which vary by county throughout the United States. Although the legislative history of BAPCPA is extensive, it is completely devoid of any mention of

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[1]H. Report No. 109-31 to accompany S 256, 109th Cong., 1st Sess. (2005), P.2, Footnote 1.

[2] 11 U.S.C. § 101(39)(A) defines "median family income" with reference to Census Bureau statistics.

[3]The court of appeals incorrectly cited the low as $52,036. Opinion, p.3 f.n.2.

Congress' basis for adopting the applicable state's median income as the threshold for classification of debtors or for incorporating into bankruptcy law the IRS national and local standards as allowable expenses.

By incorporating federal median income statistics into Title 11, Congress has adopted a different income threshold for each State for classifying individual debtors as above or below the applicable threshold. This results in the same or a similarly situated debtor being classified differently under federal law depending on which State the debtor happens to reside. Further, Congress has adopted as many allowable expense deductions as there are counties for determining if a chapter 7 case is presumed abusive and for determining the amount of disposable income available for a chapter 13 plan.

The Petitioners filed a chapter 13 petition on November 21, 2006. For the purposes of determining the scope of bankruptcy relief, the Petitioners are classified as "above median" income debtors because their income as determined under 11 U.S.C. § 101 (10A) is above the applicable median income (as defined at 11 U.S.C. § 101 (39A)) for residents of the state of Tennessee, even though they would have been classified as "below

median" income debtors if they had resided in any of six other States.

As a result of being classified as above median income debtors, 11 U.S.C. § 1325(b)(4) committed the Petitioners' chapter 13 plan to a five year repayment period rather than a three year period for below threshold debtors. Further, as above median income debtors, the Petitioners were compelled to use the IRS standards for expense deductions instead of actual expenditures incurred by below median income debtors (11 U.S.C. § 1325 (b)(3)) in determining the Petitioners' disposable income. The confirmed plan provides for a partial repayment to unsecured creditors on a pro rata basis of the Petitioners' disposable income (commonly referred to as a "pot plan").

In determining the amount of "disposable income" for above median income debtors to be committed to the chapter 13 plan, 11 U.S.C. § 1325(b)(3) adopts the means test calculations of 11 U.S.C. § 707(b)(2) for determining allowable expenses and deductions which in turn adopts IRS national and local standard expense allowances utilized to aid in tax collection that vary by county, state and region.

The Petitioners brought a declaratory judgment action on January 12, 2007, in the

district court in Chattanooga, Tennessee. The district court granted the Respondent's motion for summary judgment and ruled: that bankruptcy laws were presumed to be constitutional; that Congress had a rational basis in adopting federal census bureau statistics and mandatory expense deductions that vary by county in achieving "cost of living" adjustments in determining bankruptcy relief; and that the Petitioners failed to show how such non-uniform adjustments as a matter of federal law differed from this Court's long standing approval of Congress' incorporation of state debtor-creditor laws into bankruptcy law.

The court of appeals affirmed the district court on June 2, 2008. The Petitioners' Petition For Rehearing *En Banc* was denied on September 17, 2008. The court of appeals rejected application of a "close" or heightened scrutiny standard for reviewing challenges to bankruptcy laws under the uniformity requirements of the Bankruptcy Clause of the Constitution and affirmed the application of federal census statistics to classify debtors as above or below income threshold resulting in a non-uniform classification scheme. The court of appeals also rejected the challenge to the adoption by Congress of expense deductions which vary by county in determining abuse in chapter 7 and disposable income in chapter 13.

REASONS FOR GRANTING THE WRIT

This Case Presents Important Questions Of Constitutional Law That Have Not Been, But Should Be, Settled By This Court

A.

This Court Should Rule That Bankruptcy Laws Are Subject To A Standard Of Heightened Scrutiny For Challenges Under the Bankruptcy Clause

The district court adopted a deferential standard of presumption of constitutionality and "a quite lenient test for constitutional sufficiency" in reviewing the statutes at issue relying upon the standard for challenges to bankruptcy legislation under the Equal Protection Clause. Schultz v. U.S., 369 BR 349, 352 (ED Tn 2007), citing U.S. v. Kras, 409 U.S. 434, 446 (1973); and Stewart v. U.S. Trustee, 175 F.3d 796, 811-12 (10th Cir. 1999). The court of appeals rejected for challenges under the Bankruptcy Clause application of the "heightened scrutiny" standard adopted by this Court in United States v. Ptasynski, 462 U.S. 74, 84 (1983) for challenges to the taxing authority under Art. I sec. 8 c. 1. Schultz v. U.S., 529 F.3d 343, 355-356, (6th Cir. 2008).

The statutes at issue adopt a classification scheme based on the debtor's income by incorporating into federal law the median income census statistics for the State of the debtor's residence based on the debtor's household size, thereby creating a different income threshold for each State in determining a debtor's classification as above or below the applicable income threshold. For debtors classified as above the state income threshold, Congress adopted allowable expenses that vary by county and region in determining the presumption of abuse in chapter 7 proceedings (11 U.S.C. § 707(b)(2)(A)(i) and (ii)) and in determining disposable income in chapter 13 proceedings. 11 U.S.C. § 1325(b)(2); and In re Kagenveama, 2008 U.S. App LEXIS 13299 (9th Cir. 2008).

This is a challenge under the Bankruptcy Clause and not the Equal Protection Clause. This Court has not previously determined the standard of scrutiny to be applied to challenges to bankruptcy laws under the Bankruptcy Clause.

The court of appeals rejected application to bankruptcy legislation the "heightened scrutiny" standard of review as employed by this Court in reviewing the uniformity requirement for tax legislation under Article I § 8. cl. 1 of the U.S. Constitution. In overruling challenges to the

exclusion of Alaskan oil from the Windfall Profits Tax, this Court held in United States v. Ptasynski, 462 U.S. at 84-85, the following:

> We cannot say that when Congress uses geographic terms to identify the same subject, the classification is invalidated. The Uniformity Clause gives Congress wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems. See *Head Money*, [112 U.S. 580] at 595. This is the substance of our decision in the *Regional Rail Reorganization Act Cases*, 419 U.S. [102] at 156-161. **But where Congress does choose to frame a tax in geographic terms, we will examine the classification closely to see if there is actual discrimination.**

(Emphasis added)

This Court has previously rejected the requirement of showing discrimination by Congress before striking down bankruptcy legislation. Railway Labor Executives Ass'n. v. Gibbons, 455 U.S. 457, 471 footnote 11, (1982), ("the issue is not whether Congress has discriminated... but rather

whether [the statutory] provisions are uniform bankruptcy laws").

For much of the nation's history, Congress chose not to establish any bankruptcy laws. However, the plain language of the Constitution mandates that when Congress does choose to establish a bankruptcy law, that such law must be "uniform... throughout the United States". The requirement of uniformity is "wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country regardless of the State in which the bankruptcy court sits". Vanston Bondholder Protective Committee v. Green, 329 U.S. 156 , 172 (1946), Frankfurter, J. concurring opinion.

This Court looks to both the Bankruptcy Clause and the Uniformity Clause in determining the meaning of both. United States v. Ptasynski, 462 U.S. at 84)("[a]lthough the purposes giving rise to the Bankruptcy Clause are not identical to those underlying the Uniformity Clause, we have looked to the interpretation of one Clause in determining the meaning of the other").

Challenges to geographic uniformity under the Bankruptcy Clause should be included within legislation that "appears on its face to be within a specific prohibition of the Constitution" United

States v. Carolene Products Cove, 304 U.S. 144, 153 footnote 4 (1938) resulting in narrow application of the presumption of constitutionality.

The issue under the Bankruptcy Clause is not whether Congress intended to discriminate or whether there was a rational basis for Congress' choice of bankruptcy law, but whether such bankruptcy law is uniform throughout the country. As a result, this Court should determine that the constitutionality of a law that defines in geographic terms the eligibility for and scope of bankruptcy relief should be subject to close or heightened scrutiny.

B.

This Court Should Rule That The Classification Of A Debtor For Bankruptcy Relief Must Be Uniform Throughout The United States

This is a novel and important issue. This Court has not previously reviewed a classification scheme "which identifies by identifying characteristics a particular class of debtors." Gibbons, 455 U.S. at 471 fn 12. Prior to BAPCPA, Congress had never chosen to define a bankruptcy

classification scheme in geographic terms by using a different monetary amount per State.

In spite of hundreds of pages of legislative history, Congress made no reference to its rationale for reliance upon federal median income census calculations as the classification scheme as opposed to one national income threshold as adopted for all prior monetary calculations under bankruptcy law. Accordingly, there is no basis for deference to Congress' "considered judgment with respect to an enormously complex problem..." (United States v. Ptasynski, 462 U.S. at 86).

Congress clearly has the power under the Bankruptcy Clause to define persons eligible for bankruptcy relief and to establish separate classes of debtors. Sturges v. Crowninshield, 17 U.S. 122, 194 (1819); Gibbons, 455 U.S. at 473; and Leidgh Carriage Co. v. Stengel, 95 F. 637, 646 (6th Cir. 1899). This Court has long recognized that variations among state debtor-creditor laws made applicable to bankruptcy proceedings do not violate the Bankruptcy Clause. Vanston, 329 U.S. at 169, ("[p]arties are in a bankruptcy court with their rights and duties already established, except insofar as they subsequently arise during the course of bankruptcy administration or as part of its conduct...[a]nd the law that fixes legal

consequences to transactions is the law of the several states.") (Frankfurter, J. concurring opinion).

The Petitioners acknowledge that Congress has the power to adopt an income threshold in distinguishing between classes of debtors for determining bankruptcy relief. To be consistent with the Bankruptcy Clause, the income threshold should be the same throughout the country. State to state differences in application of bankruptcy laws should be limited to instances of incorporation of state laws and not incorporation of differences based on federal census statistics.

Examples of differences in state debtor-creditor laws made applicable to bankruptcy proceedings without offending the Bankruptcy Clause include the following: exempt assets retained by the debtor (Hanover National Bank v. Moyses, 186 U.S. 181 (1902)); the definition of property interests (Vanston, 329 U.S. at 169); attachment, perfection, and priority of security interests (Butner v. United States, 440 U.S. 48 (1979)); and creditor avoidance actions available to a bankruptcy trustee (Stellwagen v. Clum, 245 U.S. 605, 613 (1918) (bankruptcy laws "may recognize the laws of the State in certain particulars,

although such recognition may lead to different results in different States")).

The court of appeals erroneously held that the difference in the application of the bankruptcy law by Congress incorporating federal median income statistics for each state to determine the eligibility for and scope of bankruptcy relief are "analytically indistinguishable from the differences resulting from the incorporation of various state laws." Schultz, 529 F. 3d at 353.

The court of appeals failed to appreciate that federal census statistics do not impact the debtor-creditor relationship as do state laws. While Congress can pre-empt in bankruptcy legislation the effect of state law (International Shoe Company v. Pinkus, 278 U.S. 261, 265 (1929)), this does not in turn authorize Congress to establish a different income threshold for each State in determining the scope and extent of bankruptcy relief.

The lower court's holding diminishes the significance of state sovereignty to establish debtor creditor laws in the absence of pre-emption by Congress by equating federal census statistics with state debtor-creditor laws, especially in the absence of legislative history supporting the use of state median income calculations versus a uniform national standard, as is the case in every other

monetary reference contained in the bankruptcy law. See for example: chapter 13 debt limits 11 U.S.C. § 109(e); definition of family farmer 11 U.S.C. § 101(18); allowed priority wage claims 11 U.S.C. § 507(a)(4); federal exemptions 11 U.S.C. § 522(d); and definition of small business debtor 11 U.S.C. § 101(51D).

While interpreting the uniformity requirement for tax legislation, this Court in the Head Money Cases, 112 U.S. 580, 594 (1844) held that "a tax is uniform when it operates with the same force and effect in every place where the subject of it is found." For bankruptcy purposes, the same income earned by a debtor should operate the same throughout the country in determining the debtor's classification for bankruptcy relief.

This Court has never approved different bankruptcy laws for different parts of the country, which is the effect of the provisions at issue here. Petitioners are classified as above median income in some States and are classified as below median income in other States, resulting in a geographically non-uniform classification scheme which violates the standard that bankruptcy laws must meet in order to be held uniform and thus constitutional.

Accordingly, this Court should determine that classification schemes under bankruptcy law must be uniform throughout the United States and may not adopt different monetary thresholds for each State.

C.

This Court Should Rule That Bankruptcy Laws That Incorporate Mandated Expense Deductions That Vary By County Violate The Bankruptcy Clause

Prior to enactment of BAPCPA, the expense deductions to determine whether a chapter 7 proceeding constitutes substantial abuse (In re Price, 353 F.3d 1125 (9th Cir. 2004)) and to determine disposable income for a chapter 13 plan (In re Bottelbergag, 250 B.R. 256 (Bankr. Minn. 2000)) were uniformly determined by examining the debtor's actual reasonable and necessary expenditures. Under BAPCPA, many of the expense allowances are **federally** mandated as a result of incorporation into the bankruptcy law the IRS national and local standards used for tax collection. 11 U.S.C. § 707(b)(2)(A)(ii) and 11 U.S.C. § 1325(b)(3).

As a result, these federally mandated expenses vary by county throughout the country. The lower courts in spite of a lack of legislative history justified an application of different expense figures on "varying costs of living" (Schultz, 529 F.3d at 353) to sustain the non-uniform expense deductions.

This Court should determine whether Congress can recognize differences from state to state in enactment of federal bankruptcy laws based on purported cost of living differences (the legislative history is devoid of support that the IRS national and local standards even purport to accurately reflect different cost of living expenses by county) and whether such cost of living adjustments violate the requirement of geographic uniformity.

D.

This Court Should Clarify The Question Of Uniformity As Applied Under The Bankruptcy Clause

This Court in Knowlton v. Moore, 178 U.S. 41, 84 - 85 (1900) defined the uniformity challenge to progressive estate tax rates thusly:

On the one side, the proposition is that ..."uniform throughout the United States" commands that excises, duties and imposts, when levied, shall be equal and uniform in their operation upon persons and property in the sense of the meaning of the words equal and uniform, as now found in the constitutions of most of the States of the Union. The contrary construction ... simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate. The two contentions then may be summarized by saying that the one asserts that the Constitution prohibits the levy of any duty, impost or excise which is not intrinsically equal and uniform in its operation upon individuals, and the other that the power of Congress in levying the taxes in question is by the terms of the Constitution restrained only by the requirement that such taxes be geographically uniform.

In adopting the latter view, i.e. that taxes must be geographically uniform, this Court held in Knowlton, 178 U.S. at 89 as follows:

> Giving to the term uniformity as applied to duties, imposts and excises a geographical significance, likewise causes that provision to look to the forbidding of discrimination as between the States, by the levying of duties, imposts or excises upon a particular subject in one State and a different duty, impost or excise on the same subject in another[.]

With regard to the Bankruptcy Clause, this Court has previously held in Central Virginia Community College v. Katz, 546 U.S. 356, 370 (2006), the following:

> The text of Article I, § 8, cl. 4 of the Constitution, however, provides that the Congress shall have the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." Although the interest in avoiding unjust imprisonment for debt and making federal discharges in bankruptcy enforceable in every State was a primary motivation for the adoption of that provision, its coverage

encompasses the entire "subject of Bankruptcies." The power granted to Congress by that Clause is a unitary concept rather than an amalgam of discrete segments.

This Court should determine whether Congress can adopt non-geographically uniform income thresholds and mandatory expense deductions in the context of this Court's prior rulings on the uniformity requirement for both bankruptcy and tax legislation.

The court of appeals ruled that "BAPCPA directly addresses regionally isolated problems" referring to different costs of housing throughout the country, citing Blanchette v. Connecticut General Ins. Corps, 419 U.S. 102, 159 (1974) (also referred to as the Regional Rail Reorganization Act Cases) which authorized Congress "to fashion legislation to resolve geographically isolated problems." Schultz, 529 F3d at 353.

While Congress can address isolated regional problems, the solution must apply uniformly throughout the United States. Gibbons, 455 U.S. at 473 ("To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors"). In striking down the

exemption of North Carolina and Alabama from the United States Trustee fee system, St. Angelo v. Victoria Farms, Inc., 38 F3d 1525, 1533 (9th Cir. 1995) held:

> In the absence of any evidence that Congress was addressing a geographically isolated problem or some other legitimate concern, we are required to hold that its decision to ignore the [Bankruptcy] Clause...renders that section unconstitutional.

The discriminatory impact among the States to a moderately high income debtor caused by adoption of the federal median income census statistics is best visualized by the attached chart (App.H-1) which shows the allocation of the disparity of median income among the States and disputes the court of appeals' claim that BAPCPA addressed "regionally isolated problems."

Applying the reasoning of the lower court, if Congress adopted a flat income tax and classified the income to be taxed as all income above the median income for the State of the tax payer's residence, this would result in $54,026 being exempt from taxation in Mississippi but $98,505

being exempt from taxation in Connecticut. The tax would not be geographically uniform as to a particular tax payer, but the item to be taxed, i.e. the income above the state median income, would be uniformly taxed even though it would not be uniformly calculated. The classification of income to be taxed under such scheme would not be geographically uniform as it would result in a tax payer having different amounts of the same income being subject to federal tax based solely upon the tax payer's residence. This is precisely the effect of the means test on bankruptcy administration and directly violates the admonition in the Head Money Cases, 112 U.S. at 594 and Knowlton, 178 U.S. at 89.

This Court should determine whether a classification scheme that results in the amount of income tax to be paid or the scope of bankruptcy relief afforded which is based solely upon the State of residence lacks the uniformity required by the Constitution.

This Court should determine whether expense deductions incorporated into bankruptcy law that vary by county throughout the country lack the uniformity contemplated by the Constitution.

E.

This Case Presents An Important And Novel Issue That Affects Thousands Of Bankruptcy Cases.

Of the 850,912 bankruptcy petitions filed in the twelve months ending December 31, 2007, 519,364 of those were chapter 7 proceedings.[4] The Executive Office for the United States Trustees reports that of the chapter 7 proceedings filed between October 1, 2006 and June 30, 2007, 9% were classified as above median income of which 10% (or 0.9% of the total filed) were presumed abusive and that 25% of all chapter 13 proceedings were above median income.[5] The Executive Office has not published more recent statistics.

As shown by the foregoing, the median income threshold affects bankruptcy administration and is an important issue in the lower courts.

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[4] Report of the Administrative Office of U.S. Courts. See Bankruptcy statistics at http://www.uscourts.gov/news.cfm

[5] Statement of Clifford White, Director Executive Office of United States Trustee to Committee on the Judiciary of the House of Representatives dated October 2, 2007 p. 3. See http://www.usdoj.gov/ust/eo/public_affairs/testimony/docs/testimony071002.pdf

CONCLUSION

For the reasons set forth above, this Court should issue a writ of certiorari to resolve the questions presented in this case.

Respectfully submitted,
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APPENDIX

SIXTH CIRCUIT COURT APPEALS FILINGS:

Order Denying
Petition for Rehearing,
filed 09/17/08 ..... A1 - A2

Opinion,
filed 06/02/08 ..... B1 - B31

EASTERN DISTRICT OF TENNESSEE FILINGS:

Order,
filed 05/14/07 ..... C1 - C1

Judgment,
filed 05/14/07 ..... D1 - D1

OTHER

11 U.S.C. § 707(b)(2) ..... E1 - E9

11 U.S.C. § 707(b)(7) ..... F1 - F4

11 U.S.C. § 1325(b)(2) - (4) ..... G1 - G5

Colored Map By Quartile
Showing State Median Income ..... H1 - H1

List of Median Income by State ..... I1 - I2

No. 07-5618

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BERNARD F. SCHULTZ, ET AL.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER

BEFORE: RYAN, SILER, and COLE, Circuit Judges.

The court having received a petition for rehearing en bane, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en bane, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 08a0206p.06
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BERNARD F. SCHULTZ;
ELIZABETH M. SABATINE,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 07-5618

Appeal from the United States District Court
for the Eastern District of Tennessee
at Chattanooga.
No. 07-00012-R. Allan Edgar, District Judge.

Argued: March 17, 2008

Decided and Filed: June 2, 2008

Before: RYAN, SILER, and COLE, Circuit Judges.

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COUNSEL

ARGUED: Thomas E. Ray, SAMPLES, JENNINGS, RAY & CLEM, Chattanooga, Tennessee, for Appellants. Lewis Yelin, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D. C., for Appellee. **ON BRIEF**: Thomas E. Ray, SAMPLES, JENNINGS, RAY & CLEM, Chattanooga, Tennessee, for Appellants. Lewis Yelin, William Kanter, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. George W. Kuney, UNIVERSITY OF TENNESSEE COLLEGE OF LAW, Knoxville, Tennessee, for Amicus Curiae.

OPINION

R. GUY COLE, JR., Circuit Judge. Plaintiffs-Appellants Bernard Francis Schultz and Elizabeth Mary Sabatine (hereinafter "the Schultzes"), husband and wife and residents of Hamilton County, Tennessee, filed for bankruptcy under Chapter 13 in the United States Bankruptcy Court for the Eastern District of Tennessee. Independently, the Schultzes filed a complaint for declaratory judgment in the United States District Court for the Eastern District of Tennessee, alleging that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA" or "the

Act") violates Article I, Section 8, Clause 4 of the Constitution (the "Bankruptcy Clause"), which gives Congress the power to establish "*uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. 1, § 8, cl 4 (emphasis added). The district court granted the Government's motion for summary judgment and dismissed the Schultzes' complaint. For the following reasons, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A.

The Bankruptcy Code establishes two basic forms of bankruptcy that individual debtors may freely choose between: Chapter 7 and Chapter 13. In a Chapter 7 proceeding, an individual debtor receives an immediate unconditional discharge of personal liabilities for debts in exchange for the liquidation of all non-exempt assets. *See* 11 U.S.C. §§ 701-784. By contrast, in a Chapter 13 proceeding, a debtor commits to repayment of a portion of his or her financial obligations over a specified period of time (generally three to five years) in exchange for retaining non-exempt assets and receiving a broader discharge of debt than is available under Chapter 7. *See* 11 U.S.C. §§ 1301-1330. Under the bankruptcy

system prior to the BAPCPA, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of Title 11 of the United States Code), debtors had a presumption of eligibility to file under Chapter 7, with the final determination made by the Bankruptcy Court on an individualized basis. 11 U.S.C. § 727.

In 2005, the landscape for bankruptcy filings dramatically changed. Responding to a growing belief that "bankruptcy relief may be too readily available and is sometimes used as a first resort, rather than a last resort," H.R. REP. No. 109-31(1), at 4 (2005), and the prevalence of "opportunistic personal filings and abuse," *id.* at 5, Congress enacted the BAPCPA in order to require above-median income debtors to make more funds available for the payment of unsecured creditors. As a result, higher-income debtors with the ability to repay a substantial portion of their debts without significant hardship are now required to do so by filing under Chapter 13 rather than Chapter 7.

The centerpiece of the Act is the imposition of a "means test" for Chapter 7 filers, which requires would-be debtors to demonstrate financial eligibility to avoid the presumption that their bankruptcy filing is an abuse of the bankruptcy proceedings. By its terms, the BAPCPA authorizes a bankruptcy court to

dismiss a debtor's petition filed under Chapter 7 or, with the debtor's consent, to convert such a petition to Chapter 13 "if it finds that the granting of relief would be an abuse of the provisions of [Chapter 7]." 11 U.S.C. § 707(b)(1). Under this test, the first step instructs the bankruptcy court to compare the debtor's annualized current monthly income to the median family income of a similarly sized family in the debtor's state of residence. If the debtor's current monthly income is equal to or below the median, then the presumption of abuse does not arise. 11 U.S.C. § 707 (b)(7). If, however, it exceeds the median, the Act directs the court to recalculate the debtor's income by certain necessary expenses specified by the statute. *Id.* § 707(b)(2)(A)(ii). These reductions refer to the national and local standards contained in the Internal Revenue Service's Financial Analysis Handbook. *Id.; see* INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL, FINANCIAL ANALYSIS HANDBOOK ("IRS Handbook"), *available at* http://www.irs.gov/irm/part5/ch15s01.html.

Because of these deductions, eligibility under the new regime is calculated at least in part based on the state and county where the debtor resides. The housing expense deduction, for example, is governed

by the county where the debtor resides. *Id.* § 5.15.1.7(4)(A).[1] Although the national standards, which identify amounts for "food, housekeeping supplies, apparel and services, and personal care products and services," and a fixed "miscellaneous" amount, *id.* § 5.15.1.7(3), are mostly uniform throughout the United States, the local standards, which define amounts for housing and transportation, vary greatly.

If after deducting these necessary expenses and specified amounts, the debtor's current monthly income exceeds certain mathematical benchmarks, then the presumption of abuse arises. 11 U.S.C. § 707(b)(2)(A)(i). This presumption may be rebutted only if the debtor demonstrates special circumstances justifying any additional expenses or adjustments to the debtor's income for which there is no reasonable alternative, and that those special circumstances reduce the debtor's income below the specified

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[1]The BAPCPA also permits a debtor to deduct additional expenses for food, clothing, housing, utilities, health insurance, disability insurance, health savings accounts, and certain educational expenses, so as long as the debtor demonstrates that those additional allowances are reasonable and necessary. 11 U.S.C. § 707(b)(2)(A)(ii).

benchmarks. *Id.* § 707(b)(2)(B). And even if the presumption of abuse does not apply, or has been rebutted by the debtor, the BAPCPA empowers a bankruptcy court to consider whether it believes "the debtor filed the petition in bad faith," or whether "the totality of the circumstances ... of the debtor's financial situation demonstrates abuse." *Id.* § 707(b)(3).

To implement and enforce these reforms, the United States trustee or the bankruptcy administrator reviews a Chapter 7 debtor's petition and files with the court a statement explaining whether a presumption of abuse arises. *Id.* § 704(b)(1). If the trustee determines that it does, then the trustee is directed either to file a motion to dismiss, a motion to convert the petition, or to provide a statement explaining why such a motion is inappropriate. *Id.* § 704(b)(2).

The BAPCPA also amended two aspects of Chapter 13. First, "disposable income" is now defined as "currently monthly income received by the debtor ... less amounts reasonably needed to be expended." 11 U.S.C. § 1325(b)(2). If a debtor's annualized monthly income exceeds the median family income for a similarly sized family in the applicable state, the Act requires the bankruptcy court to calculate

"amounts reasonably necessary to be expended" in accordance with the same IRS Handbook's national and local standards used in Chapter 7. *Id.* § 1325(b)(3). If a debtor is below the median income, the "amounts reasonably necessary to be expended" is instead determined by the pre-BAPCPA list of deductions. *Id.* § 1325(b)(2). Second, if the debtor's income still exceeds the median after recalculation, the Act requires courts to impose a repayment period of "not less than 5 years." *Id.* § 1325(b)(4)(A)(ii). However, if the debtor's annualized income is less than the median, then the repayment period is three years. *Id.* § 1325(b)(4)(A)(i).

B.

On November 21, 2006, the Schultzes filed for bankruptcy under Chapter 13 in the United States Bankruptcy Court for the Eastern District of Tennessee. On January 13, 2007, the bankruptcy court confirmed their plan, which required payment for sixty months and resulted in a pro-rata distribution to unsecured creditors of less than 100% of their allowed claims.

Concurrently, the Schultzes brought a separate suit against the United States, which challenges the five sections of the BAPCPA that employ the "means test" -Sections 707(b)(7), 707(b)(2), 704(b), 1325(b)(3),

and 1325(b)(4)-under one central theory: because median-income calculations are based, at least in part, on the state and county in which the debtor resides, the BAPCPA is not a "*uniform* Law[] on the subject of Bankruptcies throughout the United States." U.S. CONST. art. 1, § 8, cl. 4 (emphasis added).

At the time of their Chapter 13 filing, the Schultzes had an annualized current monthly income of $84,975.84, an amount that is above the median family income for a family of five for Tennessee residents (which is $63,174), but below the median f~ly income of Connecticut, Hawaii, Massachusetts, Maryland, New Hampshire, and New Jersey.[2] As a result of this benchmark in Tennessee, the Schultzes were forced into a five-year repayment period and were unable to take advantage of more generous income exclusions available to Chapter 13 filers whose income is below the median. 11 U.S.C. § 1325(b)(3)-(4).

After the parties filed cross-motions for summary judgment, the district court granted the

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[2]Across the United States, the median family income for a family of five ranges from $52,036 in Mississippi to $98,505 in Connecticut. (Joint Appendix CJA") 73-74.)

Government's motion and dismissed the Schultzes' complaint. Canvassing relevant Supreme Court precedent, the district court concluded that the "uniformity requirement does not proscribe different results in different states because of state law variations." *Schultz v. United States*, 369 B.R. 349, 352 (E.D. Tenn. 2007). In response to the Schultzes' argument that the BAPCPA amendments are unconstitutional because they create variations in different states based on federal instead of state law, the district court explained that there is "no principled reason for concluding that variations resulting from federal statistics create unconstitutional non-uniformity, whereas variations resulting from state law do not." *Id.* The court concluded that "[d]isposable income might vary from place to place, but it is based on uniformly calculated national statistics. The variations in the results produced by these statistics are of no constitutional consequence." *Id.* at 353.

The Schultzes timely appealed. We review de novo a district court's grant of summary judgment. *Miller v. Admin. Office of the Courts*, 448 F.3d 887,893 (6th Cir. 2006).

II. ANALYSIS

A.

As a threshold matter, we address briefly the Government's contention that the Schultzes lack standing to challenge two BAPCPA provisions affecting Chapter 7 bankruptcy filings: Sections 707(b)(2) and 704(b). We review de novo the question of standing, *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565,573 (6th Cir. 2004), even "where standing has erroneously been assumed below," *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001).[3] A plaintiff has Article III standing when he or she can show: (1) an injury-in-fact that (2) was "fairly traceable to the defendant's allegedly unlawful conduct" and (3) is "likely to be redressed" via a favorable decision. *Prime Media, Inc. v. City of Brentwood*, 485 F .3d 343,349 (6th Cir. 2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The only question in dispute is whether the Schultzes have

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[3]The Government did not raise the standing issue at the district court, *Schultz*, 369 B.R. at 351 n.1, but "[s]tanding is not an affirmative defense that must be raised at risk of forfeiture." *Cmty. First Bank v. Nat'l Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994).

shown an "injury-in-fact," or "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent," *Lujan*, 504 U.S. at 560 (citations omitted), by the two presumption-of-abuse sections intended for Chapter 7 debtors. In applying the first requirement of a concrete injury, the Supreme Court made clear that a plaintiff is not entitled to injunctive or declaratory relief "[a]bsent a sufficient likelihood that he will again be wronged in a similar way," *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), unless the plaintiff is subject to "continuing, present adverse effects," *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974).

The problem, as the Government sees it, is that the Schultzes never filed a Chapter 7 bankruptcy petition, nor do they intend to do so in the future. Although the Schultzes have shown that their income is above the applicable median family income for Tennessee, *potentially* subjecting them to the challenged Chapter 7 provisions, they have not established that they would be exposed to the presumption of abuse after their monthly income is reduced by allowable expenses specified by the statute. *See* 11 U.S.C. § 707(b)(2). The Schultzes, in turn, argue that the potential for being subject to the presumption of abuse under Chapter 7 forced them

into filing under Chapter 13. And requiring a debtor to file a Chapter 7 petition with full knowledge that it would be dismissed subjects the debtor to years of litigation while his bankruptcy case, and financial situation, remain in limbo.

The questions of whether the Schultzes were deterred from filing a Chapter 7 petition, and whether the presumption of abuse would have applied after the appropriate reductions and calculations, are irrelevant for one simple reason: the parties concede that the Schultzes have standing to challenge the Chapter 13 provisions-Sections 1325(b)(3) and (4)-which use the same state-specific median income levels and varying local standards as the Chapter 7 amendments. Based on their median family income calculation in Tennessee, the Schultzes are currently repaying debt under a sixty-month Chapter 13 plan, and receive less favorable treatment in their plan than individuals in other states. Moreover, their housing and transportation expenses were determined by reference to the IRS Handbook, which varies by locality.

Because our resolution of the Schultzes' Chapter 13 challenges effectively addresses the identical claims for the Chapter 7 provisions, without regard to whether they have standing to challenge

those provisions, we find no need to resolve this issue. To put it simply, we could not invalidate some of the "means test" provisions without invalidating the others.

B.

1.

We turn to the central issue in this case: Is the BAPCPA a uniform law on the subj ect of bankruptcy? The Bankruptcy Clause of the Constitution grants Congress the power to "establish ... uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. What distinguishes these "peculiar terms" from the other Article I powers is the concept of uniformity, which, as Chief Justice Marshall noted nearly two centuries ago, "deserve[s] notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but instead to establish uniform laws on the subject throughout the United States." *Sturges v. Crowinshield*, 17 U.S. (4 Wheat.) 122, 193-94 (1819).

Echoing Justice Marshall's concern that the concept of "uniformity is, perhaps, incompatible with state legislation," *id.*, the Schultzes contend that "the classification scheme adopted by Congress based upon whether a debtor is above or below the median

income of his particular state of residence violates the Bankruptcy Clause because it results in some debtors receiving different bankruptcy relief under federal law based solely upon which state or county they happen to reside." (Appellants' Br. 8-9.) Implicit in their argument is what the Supreme Court has referred to as personal uniformity, or the notion that the bankruptcy laws should apply identically to individual debtors, regardless of the state or locality in which the debtor resides. The Court, however, has consistently described the Bankruptcy Clause's uniformity requirement as "geographical, and not personal," *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 188 (1902), which is "wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country regardless of the State in which the bankruptcy court sits," *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 172 (1946) (Frankfurter, J., concurring).

Over the last century, the Supreme Court has wrestled with the notion of geographic uniformity, ultimately concluding that it allows different effects in various states due to dissimilarities in state law, so long as the federal law applies uniformly among classes of debtors. In *Moyses*, one of the first cases

dealing with the validity of a bankruptcy statute, the Court upheld the incorporation of varying state exemptions into the 1898 Bankruptcy Act. 186 U.S. at 189-90. Geographic uniformity in this context, the Court observed, was satisfied "when the trustee takes in each state whatever would have been available if the bankrupt law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different states." *Id.* at 190. In 1918, the Court reaffirmed the *Moyses* principle in a case involving the Bankruptcy Act's incorporation of varying state fraudulent conveyance statutes, despite the fact that the laws "may lead to different results in different states." *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918). *See also Vanston*, 329 U.S. at 172 (explaining that the Bankruptcy Clause "does not mean wiping out the differences among the forty-eight States" and holding that state tort and contract law may determine the validity of creditors' claims).

Nearly sixty years later, the Supreme Court, applying *Moyses*, held that Congress may enact non-uniform laws to deal with geographically isolated problems as long as the law operates uniformly upon a given class of creditors and debtors. *Blanchette v. Connecticut General Ins. Corps.*, 419 U.S. 102 (1974).

In *Blanchette*, the Court considered the constitutionality of the Regional Rail Reorganization Act ("Rail Act"), which operated only in a single statutorily defined region: the northeast United States. In explaining why such a specific statute did not exceed Congress's power under Article I, the Court noted that at the time Congress passed the Rail Act, all of the railroads then operating under the bankruptcy laws were contained within the northeast region, and thus, even had the statute been drafted to be of general applicability, its operation and effect would have been unchanged. *Id.* at 159-60. The Court ultimately concluded that the "uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems," *id.* at 159, so long as the law "appl[ied] equally to all creditors and debtors," *id.* at 160. *See also Leidigh Carriage Co. v. Stengel*, 95 F. 637, 646 (6th Cir. 1899) (holding that the Bankruptcy Clause "imposes no limitation upon congress as to the classification of persons who are to be affected by such laws, provided only the laws shall have uniform operation").

Only once has the Court struck down a statute as non-uniform. In *Railway Labor Executives' Ass'n v.*

Gibbons, 455 U.S. 457, 470-71 (1982), the Court determined that Congress overstepped its authority in passing a private bankruptcy law that affected only the employees of a single company, the Rock Island & Pacific Railroad Company. While acknowledging that "the uniformity requirement is not a straightjacket that forbids Congress to distinguish among classes of debtors," *id.* at 469, the Court found that the Act "[was] a response to the problems caused by the bankruptcy of *one* railroad" and was therefore "nothing more than a private bill," *id.* at 470-71. The Court documented the chaos created by discriminatory state legislation during the Articles of Confederation, and concluded that the "uniformity requirement was drafted in order to prohibit Congress from enacting private bankruptcy laws." *Id.* at 472. The lesson, in short, is that "[t]o survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors." *Id.* at 473.

Applying these principles to the instant case, we conclude that the BAPCPA is a constitutionally uniform law. Congress is allowed to distinguish among classes of debtors, and to treat categories of debtors differently, whether it be through the incorporation of varying state laws "affecting dower,

exemptions, the validity of mortgages, priorities of payment and the like." *Stellwagen*, 245 U.S. at 613. And this is precisely what the BAPCPA does: Sections 707(b)(7), 1325(b)(3), and 1325(b)(4) distinguish between two classes of debtors, those whose annualized current monthly income is above the family median income for the applicable state and those whose income is below. *All* Chapter 13 below-median-income debtors have only a three-year instead of a five-year repayment period, and are subject to more favorable treatment in calculating their disposable income than all debtors above the median; *all* above-median-income debtors are subject to a repayment period of "not less than 5 years," and have their income recalculated in accordance with the IRS Handbook's national and local standards. Yes, the Schultzes may receive less favorable treatment simply because they are residents of Tennessee, a state whose median monthly income is lower than a host of others, but the same could be said of debtors living in states with favorable state property exemption laws. *See Moyses*, 186 U.S. at 190. Accordingly, "[t]he general operation of the law is uniform although it may result in certain particulars differently in different states." *Moyses*, 186 U.S. at 190.

Had Congress described the "means test" in explicit geographic terms, by enacting legislation exempting residents of certain states without justification, we would be faced with a significantly different case. In *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525 (9th Cir. 1994), for instance, the Ninth Circuit considered whether a statutory amendment extending the deadline for two states to implement an administrative program violated the uniformity provision of the Bankruptcy Clause. The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (1986), permanently established the United States Trustee Program, an administrative agency responsible for overseeing the administration of bankruptcy cases and private trustees. Congress curiously chose to phase the program in over a two-year period for every state except North Carolina and Alabama, who instead had the option of voting into the Trustee program over an extended period of time. Several years later, in Section 317 of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990), Congress extended the deadline for North Carolina and Alabama to implement the program to October 1, 2002, without

any corresponding explanation for the special treatment. *St. Angelo*, 38 F.3d at 1529.

Finding that the exemption was "not a provision which has different effects ... due to differences in the laws of these two states," *id.* at 1531, and that "Congress [did not] provide[] [any] indication that the exemption in question was intended to deal with a problem specific to North Carolina and Alabama," *id.*, the Ninth Circuit concluded that the law did "not apply uniformly to a defined class of debtors," *id.* at 1532.

But there are key differences between the BAPCPA and the statute in *St. Angelo*. For one, as we have already noted, the BAPCPA is uniform in form: all debtors whose income is above the median family income are treated alike, as are all debtors whose income falls below. The resulting differences based on the state in which the debtor resides are analytically indistinguishable from the differences resulting from the incorporation of various state laws. For another, whereas in *St. Angelo* there was no indication that Congress intended for the exemption to deal with a problem specific to North Carolina and Alabama, the BAPCPA directly addresses regionally isolated problems. Because debtors in certain parts of the country are likely to

pay more for housing than debtors in other parts, Congress believed that the means test-or "needs-based bankruptcy relief'-could gauge varying costs of living, and thus "ensure that debtors repay creditors the maximum they can afford." H.R. REP. NO. 109-31(I), at 2. The Bankruptcy Clause "does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems," *Blanchette*, 419 U.S. at 159, and it is not for us as an appellate court to pass judgment on the wisdom of congressional legislation.

2.

The Schultzes next argue that the uniformity requirement was enacted in response to the fear that the national government would use its power over commerce to the disadvantage of particular states. (Appellants' Br. 12-21; Amicus Br. 4-5.) Accordingly, even if a federal bankruptcy law may vary in application from state to state, employing *federal* income standards enables the preferential treatment of debtors in some states over debtors in other states, a form of discriminatory treatment the Framers explicitly prohibited. We do not find their argument or their view of history compelling.

First, Supreme Court precedent lends no support to the federal versus state distinction. *Moyses, Stellwagen,* and *Blanchette* cannot be read as standing for anything more than their precise holding: that Congress does not exceed its constitutional powers in enacting a bankruptcy law that permits variations based on state law or to solve geographically isolated problems. Although the Supreme Court has not specifically addressed classifications based on federal law such as those in the BAPCPA, we find no reasoning within the relevant case law explaining why employing federal variations somehow makes a bankruptcy law non-uniform. The lesson of *Moyses* and its progeny-that Congress may permissibly address regional variations-would apply equally to variations based on either state laws or federal statistics.

And *Gibbons* does not counsel a different result. There, the Court struck down a federal bankruptcy law as violative of the uniformity provision on the ground that the Act was a law designed for and applied to only one bankrupt railroad. 455 U.S. at 470-71. The BAPCPA, in contrast, is uniformly applicable across the nation and does not target any isolated entity.

True, the Court has recognized that "the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power." *Gibbons*, 455 U.S. at 468. But a strict reading of this statement "overlooks the flexibility inherent in the constitutional provision," *Blanchette*, 419 U.S. at 158, and improperly cabins the reach of Congress's authority. It is worth noting that in every case considering the scope of the Clause, the Court merely assumed that the term "uniform" implied an affirmative restriction, and ultimately concluded that such a restriction could be satisfied by a law that is uniform only in form.

Nor does the original understanding of the Bankruptcy Clause support the federal versus state distinction that the Schultzes urge us to adopt. We need not belabor the point, as a historical account of the Bankruptcy Clause has been recounted numerous times, including once recently by this circuit. *See In re Hood*, 319 F.3d 755, 764-65 (6th Cir. 2003), *aff'd on other grounds, Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004). It suffices to say the following: the Bankruptcy Clause emerged amidst a depressed economy, collapsing business ventures, and the prospect of commercial warfare between the various states. To combat mounting debt crises in the

newly confederated America, states enacted "an ignoble array of legislative schemes" discharging the debt obligations of their citizens, primarily at the expense of out-of-state creditors. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398,427 (1934).

Faced with multiple obstacles for collecting debt, and the resulting economic harm, the Framers believed that a federal-and "uniform"-bankruptcy system would be necessary to reduce the problem inherent in applying varying state insolvency and bankruptcy rules, and to rein in the pro-debtor excesses of state legislatures. *See Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356,362-63 (2006) ("The history of the Bankruptcy Clause ... demonstrate[s] that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena. Foremost on the minds of those who adopted the Clause were the intractable problems, not to mention the injustice, created by one State's imprisoning of debtors who had been discharged ... in and by another State."); *Hood*, 319 F .3d at 764-65 ("Indeed, setting bankruptcy policies on the state level would enable states to favor in-state creditors over similarly-situated out-of-state creditors. By granting the power to Congress

exclusively, the Constitution prevented runaway states from defeating bankruptcy's goals."); *In re Dehon, Inc.*, 327 B.R. 38, 56 (Bankr. D. Mass. 2005) ("[T]he use of the word 'uniform' in the Bankruptcy Clause was not primarily intended as a restriction on congressional power, but as a *grant* of power to Congress. The very structure of the clause and its placement in the Constitution clarify this point. "). *See also* BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 183-85 (2002); Kurt H. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 AM. J. LEGAL HIST. 215, 225-27 (1957). [4]

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[4]Indeed, the only direct reference to the Bankruptcy Clause in the Federalist Papers conveys the idea that uniform bankruptcy laws were necessary to protect creditors in a national economy. James Madison recognized in No. 42 that "[t]he power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question." THE FEDERALIST No. 42, at 239 (James Madison) (Clinton Rossiter ed., 1961). So did Alexander Hamilton in No. 32, when he explained that the word "uniform" in the Naturalization Clause-a provision that closely mirrors that of the

In light of this account, we find no merit in the Schultzes' argument that Congress can incorporate state laws, but cannot incorporate federal standards. At the time of the Constitutional Convention, the fear was not, at least in the bankruptcy context, of Congress discriminating in favor of or against a particular locality. Quite to the contrary, uniformity in the Bankruptcy Clause was viewed as a way to safeguard the nation's interest in establishing and maintaining a single system of debt and credit without interference from the parochial or otherwise obstreperous action on the part of the fifty states. *See Dehon*, 327 B.R. at 56 n.34.

3.

One final point needs to be addressed: We are not persuaded that the heightened scrutiny applied in *United States v. Ptasynski*, 462 U.S. 74, 84 (1983), is relevant to the interpretation of the Bankruptcy Clause. In *Ptasynski*, the Court considered whether a section of the Crude Oil Windfall Profit Tax Act

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Bankruptcy Clause-confers on Congress the "exclusive jurisdiction" to regulate within that area, "because if each State had power to prescribe a *distinct rule*, there could not be a *uniform rule*." THE FEDERALIST No. 32, at 199 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

granting an exemption for oil produced in certain regions near Alaska violated the uniformity provision in the Taxing Power. Although the Court ultimately upheld the exemption, it began its analysis with the presumption that the "the Uniformity Clause was proposed as one of several measures designed to limit the exercise of [Congress's] power," *id.* at 81, and applied a form of heightened scrutiny: "[W]here Congress does choose to frame a tax in geographic terms, we will examine the classification closely to see if there is actual geographic discrimination." *Id.* at 84-85.

However, the text and the background of the Taxing Power is wholly inapposite to that of the Bankruptcy Clause. We need not look any further than the plain language of the Bankruptcy Clause, which states: "[The Congress shall have Power] to establish ... uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. Reading these words in conjunction with the Taxing Power, another clause in Congress's enumerated powers, reveals a striking contrast. The Taxing Power states: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, ... *but* all Duties, Imposts and Excises *shall* be uniform throughout the United

States." U.S. CONST. art. I, § 8, cl. 1 (emphasis added). If the Framers had intended both of these uniformity provisions to be read as an absolute limitation, requiring Congress to enact perfectly uniform laws, they presumably would have employed similar language in the Bankruptcy Clause by stating that "Congress shall have Power to establish Laws on the subject of Bankruptcies, but all such Laws shall be uniform throughout the United States." *See* Randolph J. Haines, *The Uniformity Power: Why Bankruptcy is Different*, 77 AM. BANKR. L.J. 129, 166-67 (2003) [hereinafter *The Uniformity Power*].

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), provides ample support for this reading of constitutional text. In his foundational analysis in *McCulloch*, Justice Marshall concluded that "necessary" as used in the Necessary and Proper Clause should be interpreted as conferring an additional grant of power, rather than a limitation on Congress's authority to choose only those means that were absolutely necessary: "1 st. The clause is placed among the powers of congress, not along the limitations on those powers. 2d. Its terms purport to enlarge, not diminish the powers vested in the government." *Id.* at 419-20. Much like the

Bankruptcy Clause, if Congress intended "necessary" to imply a restraint on the sphere of congressional authority, it "would have been expressed in terms resembling these. 'In carrying into execution the foregoing powers, and all others,' &c. 'no laws shall be passed but such as are necessary and proper.'" *Id.* at 420. *See also* Haines, *The Uniformity Power*, at 167. As it was in *McCulloch*, so it is here: the term "uniform" was intended to grant an additional power at the expense of the fifty states, rather than to limit the scope of Congress's delegated powers.

While it is true that the Supreme Court has "looked to the interpretation of [the Bankruptcy Clause] in determining the meaning of the [Taxation Power]," *Ptasynski*, 462 U.S. at 83 n.13 (citing *Blanchette*, 419 U.S. at 160-61), the Court has never found prior precedent in one area to be dispositive in the other, nor has it required appellate courts to apply the heightened scrutiny in *Ptasynski* to cases interpreting the Bankruptcy Clause. In fact, the Court in *Ptasynski* acknowledged in the very same footnote that "the purposes giving rise to the Bankruptcy Clause are not identical to those underlying the [Taxing Power's] Uniformity Clause ...." *Id.* The lengthy historical discussion in *Ptasynski* shows that the Taxing Power emerged from the

"concern that the national government would use its power over commerce to the disadvantage of particular States," *id.* at 81, a history that stands in stark contrast to the problems inherent in applying varying state bankruptcy rules to debtors and creditors living in different states. In sum, uniformity of taxes and duties served to assure the states that Congress would not discriminate in favor of or against a particular locality, whereas uniformity in the bankruptcy context was viewed as a grant of power to standardize creditor relief across the nation, notwithstanding varying obtrusive state laws. We therefore find it inappropriate to employ the heightened scrutiny in *Ptasynski* and to determine whether the BAPCPA results in "actual geographic discrimination." *Id.* at 85.

III. CONCLUSION

For those reasons, we **AFFIRM** the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE AT CHATTANOOGA

BERNARD FRANCIS SCHULTZ
ELIZABETH MARY SABA TINE
Plaintiffs,

v.

UNITED STATES OF AMERICA,
ALBERTO GONZALES,
ATTORNEY GENERAL OF THE
UNITED STATES OF AMERICA
and, RICHARD CLIPPARD,
UNITED STATES TRUSTEE REGION 8
Defendants.

Civ. No. 1:07-CV-12
Judge Edgar

ORDER

The Defendants have filed a motion for leave to respond to the Brief of Professor George W. Kuney as *Amicus Curiae*. [Court Doc. No. 26]. Defendants ask this Court to allow them to consolidate their response to the Amicus Curiae brief with their response to Plaintiffs' Supplemental Post-Argument Brief. The Court

hereby **GRANTS** Defendants' motion to respond to Professor Kuney's *Amicus Curiae* brief and to consolidate their response with their response to Plaintiffs' Supplemental Post-Argument Brief.

SO ORDERED.

ENTER.

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE AT
CHATTANOOGA

BERNARD FRANCIS SCHULTZ
ELIZABETH MARY SABA TINE
Plaintiffs,

v.

UNITED STATES OF AMERICA,
ALBERTO GONZALES,
ATTORNEY GENERAL OF THE
UNITED STATES OF AMERICA
and, RICHARD CLIPPARD,
UNITED STATES TRUSTEE REGION 8
Defendants.

Civ. No. 1:07-CV-12
Judge Edgar

JUDGMENT ON DECISION BY THE COURT

This case came before the Court on the motion for summary judgment by Plaintiffs Bernard Francis Schultz and Elizabeth Mary Sabatine and on the motion for summary judgment by the Defendants. The Honorable R. Allan Edgar, United States District Judge, having

rendered a decision on the parties' motions for summary judgment,

It is **ORDERED and ADJUDGED** that the Plaintiffs Bernard Francis Schultz and Elizabeth Mary Sabatine take nothing from Defendants and that the action be **DISMISSED WITH PREJUDICE** on the merits. It is further **ORDERED and ADJUDGED** that Defendants recover of the Plaintiffs their costs of action.

Dated at *Chattanooga, Tennessee*, this 14th day of May, 2007.

/s/ Patricia L. McNutt
PATRICIA L McNUTT
CLERK OF COURT

11 U.S.C. §707(b)(2)
Dismissal of a case or conversion to a case under chapter 11 or 13

(b) (2)

(A)

(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of--

(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000 [$6,000 (added by BAPCPA 10-17-05)], whichever is greater; or

(II) $10,000 [$10,000 (added by BAPCPA 10-17-05)].

(ii)

(I) The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses shall include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor. Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts. In addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the

debtor and the family of the debtor from family violence as identified under section 309 of the Family Violence Prevention and Services Act, or other applicable Federal law. The expenses included in the debtor's monthly expenses described in the preceding sentence shall be kept confidential by the court. In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service.

(II) In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including

parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses.

(III) In addition, for a debtor eligible for chapter 13, the debtor's monthly expenses may include the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.

(IV) In addition, the debtor's monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed $1,500 [$1,500 (added by BAPCPA 10-17-05)] per year per child, to attend a private or public elementary or

secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses referred to in subclause (I).

(V) In addition, the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the actual expenses for home energy costs if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary.

(iii) The debtor's average monthly payments on account of secured debts shall be calculated as the sum of--

(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and

(II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts; divided by 60.

(iv) The debtor's expenses for payment of all priority claims (including priority child support and alimony claims) shall be calculated as the total amount of debts entitled to priority, divided by 60.

(B)

(i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special

circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

(ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide--

(I) documentation for such expense or adjustment to income; and

(II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.

(iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.

(iv) The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (i) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of--

(I) 25 percent of the debtor's nonpriority unsecured claims, or $6,000 [$6,000 (added by BAPCPA 10-17-05)], whichever is greater; or

(II) $10,000 [$10,000 (added by BAPCPA 10-17-05)].

(C) As part of the schedule of current income and expenditures required under section 521, the debtor shall include a statement of the debtor's current monthly income, and the calculations that determine whether a presumption arises under subparagraph (A)(i), that show how each such amount is calculated.

(D) Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing, if the debtor is a

disabled veteran (as defined in section 3741(1) of title 38), and the indebtedness occurred primarily during a period during which he or she was--

(i) on active duty (as defined in section 101(d)(1) of title 10); or

(ii) performing a homeland defense activity (as defined in section 901(1) of title 32).

11 U.S.C. §707(b)(7)
Dismissal of a case or conversion to a case under chapter 11 or 13

(7)

(A) No judge, United States trustee (or bankruptcy administrator, if any), trustee, or other party in interest may file a motion under paragraph (2) if the current monthly income of the debtor, including a veteran (as that term is defined in section 101 of title 38), and the debtor's spouse combined, as of the date of the order for relief when multiplied by 12, is equal to or less than--

(i) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(ii) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(iii) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a

family of 4 or fewer individuals, plus $525 [$525 (added by BAPCPA 10-17-05)] per month for each individual in excess of 4.

(B) In a case that is not a joint case, current monthly income of the debtor's spouse shall not be considered for purposes of subparagraph (A) if--

(i)

(I) the debtor and the debtor's spouse are separated under applicable nonbankruptcy law; or

(II) the debtor and the debtor's spouse are living separate and apart, other than for the purpose of evading subparagraph (A); and

(ii) the debtor files a statement under penalty of perjury--

(I) specifying that the debtor meets the requirement of subclause (I) or (II) of clause (i); and

(II) disclosing the aggregate, or best estimate of the aggregate, amount of any cash or money payments received from the debtor's spouse attributed to the debtor's current monthly income.

[Dollar amounts in subsection 707(b) are adjusted on April 1 every 3 years by section 104. Adjusted amounts effective 4-1-04 are in brackets.]

(c)

(1) In this subsection--

(A) the term "crime of violence" has the meaning given such term in section 16 of title 18; and

(B) the term "drug trafficking crime" has the meaning given such term in section 924(c)(2) of title 18.

(2) Except as provided in paragraph (3), after notice and a hearing, the court, on a motion by the victim of a crime of violence or a drug trafficking crime, may when it is in the best

interest of the victim dismiss a voluntary case filed under this chapter by a debtor who is an individual if such individual was convicted of such crime.

(3) The court may not dismiss a case under paragraph (2) if the debtor establishes by a preponderance of the evidence that the filing of a case under this chapter is necessary to satisfy a claim for a domestic support obligation.

11.U.S.C. §1325(b)(2)-(4)
Confirmation of plan

(b)(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended--

(A)

(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for

the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2) shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than--

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a

family of 4 or fewer individuals, plus $525 [$525 (added by BAPCPA 10-17-05)] per month for each individual in excess of 4.

(4) For purposes of this subsection, the "applicable commitment period"--

(A) subject to subparagraph (B), shall be--

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than--

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable

State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 [$525 (added by BAPCPA 10-17-05)] per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

[Dollar amounts in subsections 523(a)(2)(C)(i) and (ii) are adjusted on April 1 every 3 years by section 104. Adjusted amounts effective 4-1-04 are in brackets.]

(c) After confirmation of a plan, the court may order any entity from whom the debtor

receives income to pay all or any part of such income to the trustee.

State	Median Income
Connecticut	98505
New Jersey	96561
Maryland	95908
Massachusetts	91720
New Hampshire	87822
Hawaii	85540
Rhode Island	84597
Virginia	83730
Minnesota	83695
Alaska	82860
Delaware	82588
Illinois	78668
New York	78470
Washington	78403
Michigan	77842
Vermont	77682
Wisconsin	77364
California	77012
Colorado	76600
Pennsylvania	74946
Ohio	73034
Iowa	71875
Kansas	71229
Maine	71106
Nebraska	71100
Indiana	70864
Georgia	70727
Missouri	70147
Wyoming	69233
Florida	68569
Oregon	68245
Nevada	68077
South Dakota	67609
Arizona	67402
North Dakota	66226
North Carolina	65781
Utah	64299
South Carolina	64232
Texas	63811
Tennessee	63174
Louisiana	62245
Montana	61941
Kentucky	61292
Alabama	59990
Oklahoma	59438
Idaho	58770
West Virginia	58592
Arkansas	58517
District of Columbia	56548
New Mexico	54523

Mississippi		54026
	TOTAL:	3683135
	AVG:	72218.33

The foregoing is color coded to match the accompanying map. The various colors represent quartiles. This is based on Exhibit 1 to the complaint by taking the family of four persons and adding $ 6300 as provided in 11 USC §§ 707(b)(7), 1325(b)(3) and 1325(b)(4).